2017 IL App (2d) 140823-U
No. 2-14-0823
Order filed March 20, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-4234
CLARENCE J. WEBER,	)	Honorable Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel did not violate Rule 651(c) by failing to recast defendant's due process claim as a claim of ineffective assistance of counsel: as the ineffective-assistance claim would have been without merit, the amendment was not "necessary" under the rule.

¶ 2 Defendant, Clarence J. Weber, appeals from an order of the circuit court of Lake County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2012)) for relief from his conviction, following a bench trial, of two counts of solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2008)). Defendant

argues that he did not receive reasonable assistance from the attorney appointed to represent him in connection with the postconviction proceedings. We affirm.

¶ 3 At trial, the State presented evidence that, in September 2008, defendant was in custody in the Lake County jail, charged with first-degree murder in connection with the death of his wife.[1] A fellow inmate, Jermaine Daniels, testified that he and defendant had become friendly. Daniels had pleaded guilty to a charge of retail theft and was awaiting sentencing. At some point, defendant remarked that the charges against Daniels were minor and that it was likely that Daniels would be released soon. Defendant asked Daniels if he would be willing to kill three witnesses—Yuji Tamura, Martha Bautista, and defendant's sister-in-law, Cynthia Trujillo—who were expected to testify against defendant at his murder trial. A day later, defendant and Daniels spoke again about Daniels killing the witnesses. Defendant initially offered to pay $100,000 to have the witnesses killed. Daniels asked defendant how he could afford to pay that amount. Daniels testified that "[defendant] said that *** his daughter has money, and he's getting a settlement from his house that caught on fire." Defendant suddenly reduced the offer to $10,000, but Daniels agreed to accept that sum. Daniels subsequently informed his attorney and law enforcement officials of defendant's offer. Daniels testified that he hoped to receive favorable treatment from the State in his own criminal case by cooperating with law enforcement officials.

¶ 4 The Lake County sheriff's department obtained authorization to secretly record conversations between Daniels and defendant. On October 1, 2008, while wearing an eavesdropping device, Daniels spoke with defendant about killing the witnesses. The conversation was secretly recorded. The recording itself and a transcript of the recording were admitted into evidence. During the conversation, Daniels indicated that he was writing down the

[1] Defendant was ultimately found guilty of committing that offense.

number of an account to which payment should be transferred. Defendant then asked how he would know "they're gona [*sic*] be disappearing." Daniels asked defendant if he wanted to "read it in the paper" or "see it in the news." Defendant responded, "I just want to know that it's especially him because if he's lying, he's' [*sic*] gona [*sic*] hang me[.]" Daniels asked, "so you want the Eugene [*sic*] guy right." Defendant responded, "yeah and Martha." Defendant and Daniels engaged in the following exchange:

> "[Defendant]: I'm thinking, if those two persons are gone and what I would like to do is maybe put the fear of God in Cynthia for fuckin [*sic*] around with my kids[.]
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> ***
>
> [Defendant]: But I want to get out as soon as possible so as soon as I can get that shit out, the sooner I can tell them now lets [sic] go to jury trial and then their [*sic*] gona [*sic*] ask for those people to come in[.]
>
> [Daniels]: [A]nd they're not gona [*sic*] be there[.]
>
> [Defendant]: That's what I'm saying, that's what I need[.]"

Notes taken by Daniels containing personal information about Tamura, Bautista, and Trujillo were admitted into evidence.

¶ 5 Daniels admitted that he had misdemeanor and felony convictions of retail theft, fleeing and eluding, burglary, attempted deceptive practices, and forgery in Lake, Du Page, and Cook counties. On cross-examination, Daniels testified that he was released from the Lake County jail on a recognizance bond on October 8, 2008, and was permitted to withdraw his plea in the Lake County retail theft prosecution. He subsequently entered into a new plea agreement pursuant to which he was sentenced to time served. Daniels admitted that, in 2009, he was in custody in the Du Page County jail facing criminal charges and was ultimately convicted of aggravated fleeing

and eluding. Daniels also acknowledged that, while in custody, he again acted as an informant for law enforcement officials and was equipped with an electronic eavesdropping device. His assistance resulted in a lighter sentence. Daniels admitted telling law enforcement officers that he liked to project an aura of legal knowledge so that other inmates would seek his help.

¶ 6 As noted, the trial court found defendant guilty of two counts of solicitation of murder for hire. Defendant appealed, and we affirmed his convictions. *People v. Weber*, 2012 IL App (2d) 110916-U. Defendant subsequently filed a *pro se* petition under the Act. He claimed, *inter alia*, that the State had violated his right to due process of law by failing to disclose the full extent of Daniels's history of cooperation with law enforcement officials. In support of that claim, defendant attached an application by a detective from the Du Page County sheriff's office for authorization to outfit Daniels with an eavesdropping device. The application, which was dated April 14, 2010, stated that Daniels was an inmate in the Du Page County jail and that he had informed law enforcement officials that a fellow inmate had discussed a plot to kill police officers. According to the application, Daniels had advised law enforcement officials that he had frequented the law library and had developed a reputation "for having a good working knowledge of legal matters." Daniels also claimed to have "knowledge of police procedural and protocol standards that *** stems from his experience as a Confidential Source of Information for the Federal Bureau of Investigations [*sic*] in the area of narcotics and money laundering." According to the application, "the knowledge that [Daniels] gained from this experience regarding procedure is combined with legal research to offer informal guidance to fellow inmates regarding their cases." In his *pro se* petition, defendant claimed that the State had sought to portray Daniels as a petty offender who lucked upon information that he could use to negotiate a

deal with prosecutors when, in fact, Daniels was "an habitual informant who manipulated the system, and defendants for the sole purpose of his own personal benefits."

¶ 7 Defendant also claimed in his postconviction petition that the State violated his sixth amendment right to counsel by using an informant to secure incriminating statements after adversarial proceedings had been initiated. Defendant additionally claimed that the State failed to prove his guilt beyond a reasonable doubt. Finally, defendant claimed that his appellate counsel was ineffective for not raising these issues on direct appeal. The trial court appointed counsel to represent defendant and docketed the petition for further proceedings under the Act. Counsel filed a supplemental petition adopting defendant's *pro se* petition and summarizing defendant's legal theories. The State moved to dismiss the petition and the trial court granted the motion. This appeal followed.

¶ 8 The general principles governing proceedings under the Act, as described by our supreme court, are as follows:

> "The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' [Citation.] The court makes an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. [Citation.] The court considers the petition's 'substantive virtue' rather than its procedural compliance. [Citation.] If the court determines the petition is frivolous or patently without merit, the court dismisses the petition. [Citation.] If the petition is not dismissed, it will proceed to the second stage.
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> At the second stage, the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. [Citation.] The State may

then file a motion to dismiss the petition. [Citation.] If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage and the court will conduct an evidentiary hearing on the merits of the petition. [Citation.]" *People v. Hommerson*, 2014 IL 115638, ¶¶ 7-8.

¶ 9 The Act was designed to permit inquiry into constitutional issues that were not, and could not have been, adjudicated previously on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22. Accordingly, issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* An otherwise forfeited claim will not be barred, however, if the failure to raise the claim on direct appeal was due to the ineffective assistance of appellate counsel. *Id.*

¶ 10 In postconviction proceedings, the defendant's right to counsel is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, "defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial." *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). In cases where the petition was initially filed *pro se*, counsel has certain specific duties under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). See *Davis*, 382 Ill. App. 3d at 711. In such cases, "[t]he record [on appeal] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 11 Although postconviction counsel filed a proper certificate in this case,[2] defendant contends that counsel nonetheless failed to provide reasonable assistance and that the dismissal of his petition must therefore be reversed. Defendant's argument focuses on counsel's responsibility to make necessary amendments to his *pro se* petition. According to defendant, it is apparent from the record that trial counsel was familiar with the contents of the April 14, 2010, application to outfit Daniels with an eavesdropping device in an unrelated investigation. Therefore, defendant argues, the application provided no support for the claim that the State improperly withheld this information from the defense. Defendant argues that, under these circumstances, postconviction counsel was obligated to recast that claim as one of ineffective trial counsel. According to defendant, although trial counsel apparently had knowledge of the contents of the April 14, 2010, application, counsel did not use that information to full advantage in cross-examining Daniels. Defendant argues that trial counsel should have stressed defendant's work as an informant for the Federal Bureau of Investigation as evidence that Daniels was capable of manipulating fellow inmates and law enforcement officials.

¶ 12 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's

[2] We take judicial notice of records of this court showing that defendant was represented by the same attorney in both the postconviction proceeding in this case and a postconviction proceeding challenging his first-degree murder conviction. We note that the Rule 651(c) certificate for the case at bar was misfiled in the record on appeal for the first-degree murder prosecution.

unprofessional errors, the result of the proceeding would have been different." To establish that counsel's performance was deficient, "the defendant must overcome the 'strong presumption' that his counsel's representation fell within the 'wide range of reasonable professional assistance.' " *People v. Franklin*, 135 Ill. 2d 78, 117 (1990) (quoting *Strickland*, 466 U.S. at 694).

¶ 13 It is well established that "[t]he decision of whether and how to conduct a cross-examination is generally a matter of trial strategy, which cannot support a claim of ineffective assistance of counsel." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 34. Defendant nonetheless contends that, for purposes of this appeal, he "need not show that trial counsel was indeed ineffective for failing to confront Daniels with his work with the FBI." As authority for that proposition, defendant cites *People v. Turner*, 187 Ill. 2d 406 (1999). Defendant's reliance on *Turner* is misplaced.

¶ 14 In *Turner*, counsel was appointed for a defendant whose *pro se* petition raised claims that could have been raised on direct appeal. The *Turner* court held that postconviction counsel should have amended the petition to allege ineffective assistance of appellate counsel, thereby overcoming the forfeiture rule. This was among the errors that led the court to conclude, *based on the totality of the circumstances*, that postconviction counsel did not provide reasonable assistance. *Id.* at 414-15. The court further concluded that "it is improper to determine the merit of petitioner's claims where counsel essentially did nothing to shape the petitioner's claims into the appropriate legal form." *Id.* at 416-17. Counsel's performance was inadequate in *Turner* because counsel failed to take steps to overcome procedural hurdles for defendant's claims to be considered on the merits. Without examining the merits of the claims, one could not say that the amendment would have been *sufficient* to overcome a motion to dismiss, but it would have at

least been *necessary*. Here, in contrast, the suggested amendment would have altered the constitutional theory underlying defendant's *pro se* claim. Defendant's *pro se* claim was rooted in the due process guarantee; the suggested amendment is based on the right to the effective assistance of counsel. To apply the *Turner* analysis here would require us to conclude that the suggested amendment represents the "appropriate legal form" (*id.* at 417) of defendant's claim. Without examining the merits, we see no principled basis for drawing this conclusion.[3] In our view, a proper merits-based inquiry must focus on whether the amendment would have survived a motion to dismiss by the State. In other words, would the amended claim make "a substantial showing of a constitutional violation"? *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). An amendment touching on the merits of the claim (as opposed to procedural hurdles) cannot be considered "necessary" unless this condition is met. We conclude that it has not been met in this case.

¶ 15 Even if it could be said that trial counsel's failure to cross-examine Daniels about his work as an FBI informant was objectively unreasonable, it caused no prejudice. It is evident from the trial court's remarks when finding defendant guilty that the trial court was inclined to view Daniels's testimony with tremendous skepticism. The court specifically noted that Daniels was "far from a good citizen," that he "got a great deal as far as the disposition of his case," and that he was "definitely an opportunist." The court concluded, however, that it was clear from defendant's own words, secretly recorded by police, that defendant was guilty of solicitation of

[3] We note that Rule 651(c) requires counsel to amend the *defendant's* claims; it does not require counsel to raise *new* claims on the defendant's behalf. *People v. Davis*, 156 Ill. 2d 149, 163 (1993). For purposes of our analysis, we assume that the suggested amendment would *not* have raised a new claim.

murder for hire. There is no reasonable probability that more evidence to impeach Daniels would have overcome the incriminating weight of defendant's own words. Defendant could not have made a substantial showing of a violation of his constitutional right to the effective assistance of counsel. Thus, while we would not condone an attorney's failure to put a *pro se* postconviction claim in the proper substantive form, that did not occur here.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 17 Affirmed.